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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL RANDOLF
BRUMFIELD, JR.,

Defendant and Appellant.

B319717

(Los Angeles County
Super. Ct. No. SA092218)

APPEAL from an order of the Superior Court of Los Angeles County, Kathryn A. Solorzano, Judge. Affirmed as modified with directions.

Stephen M. Vasil, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Senior Assistant Attorney General, Kenneth C. Byrne and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

Paul Randolph Brumfield, Jr. appeals the trial court's order summarily denying his petition for vacatur of his murder conviction and resentencing under Penal Code section 1172.6.¹

On appeal, Brumfield contends that: (1) he is entitled to resentencing because the instructions given to the jury permitted it to find him guilty of second degree murder as a consequence of the jury finding that he violated the prima facie speed law and committed gross vehicular manslaughter; (2) counsel provided ineffective assistance at his section 1172.6 hearing, and (3) the matter must be remanded for the trial court to recalculate Brumfield's custody credits and correct errors in the abstract of judgment.

We affirm the trial court's order denying Brumfield's section 1172.6 petition, modify the abstract of judgment to reflect that the trial court did not impose three one-year enhancements under section 667.5, subdivision (b), and remand the matter for the trial court to recalculate Brumfield's custody credits.

FACTS AND PROCEDURAL HISTORY²

On November 15, 2015, officers noticed that Brumfield was driving in an unusual manner. They checked the license plates and learned that the vehicle had been stolen, so they began

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² The facts and procedural history up to and including Brumfield's direct appeal are taken from the prior unpublished opinion in *People v. Brumfield* (Feb. 6, 2019, B282348 [nonpub. opn.]), as modified on denial of rehearing (Mar. 8, 2019).

following Brumfield. Brumfield drove on the highway and then on several surface streets at a high rate of speed. He made unsafe lane changes, weaving through traffic, and ran two stop signs. On Venice Boulevard, one of the officers saw a pedestrian at an intersection on the center island look to his right toward the traffic. The pedestrian stepped off the island into the crosswalk and crossed against a red light. There were no oncoming vehicles approaching the intersection at that point. The pedestrian looked down at his phone or his hand and walked at a normal speed. Brumfield accelerated out of traffic and hit the pedestrian. The officer saw a cloud of blood, and the victim's decapitated body flying through the air. He testified that Brumfield could have avoided the victim by moving to either the second or the third lane, which were both unoccupied, but instead lined up with the victim and accelerated. Brumfield did not brake before or after the impact. He continued traveling at a high rate of speed, accelerating away from the intersection. Brumfield escaped apprehension on the day of the killing.

Brumfield abandoned the vehicle on Rose Avenue, where the manager of an apartment building discovered it a few days later. One of the residents of the apartment building noticed damage to the front end of the car and a blood-stained hole in the windshield. He was concerned that the vehicle had been involved in a fatal accident, so he notified the authorities. Responding officers determined that the vehicle had been stolen and was involved in a crime. The interior of the car was spattered with blood. An officer recovered a severed head that was on the floorboard covered by a blanket.

Brumfield was arrested for an unrelated offense on November 20, 2015. Forensic evidence, including DNA, cell

phone evidence, and witnesses tied Brumfield to the vehicle and the incident.

Brumfield was tried as the sole perpetrator of the killing. As relevant here, the jury was instructed regarding violation of the prima facie speed law (CALCRIM No. 595), gross vehicular manslaughter (a modified version of CALCRIM No. 592), and second degree murder (CALCRIM No. 520). The jury was not instructed on the natural and probable consequences doctrine or felony murder.

The jury found Brumfield guilty of second degree murder (§ 187, subd. (a); count 1), driving or taking a vehicle without the owner's consent (Veh. Code, § 10851, subd. (a); count 2), gross vehicular manslaughter (§ 192, subd. (c)(1); count 3), and hit-and-run driving resulting in death (Veh. Code, § 20001, subd. (b)(2); count 4). The jury found true the allegation that Brumfield fled the scene of the collision in count 3. (Veh. Code, § 20001, subd. (c).)

In a bifurcated trial, the trial court found true the allegations that Brumfield suffered a prior serious or violent felony conviction within the meaning of the three strikes law (§§ 667, subds. (b)–(i) & 1170.12, subds. (a)–(d)), a prior serious felony conviction within the meaning of section 667, subdivision (a)(1), and three prior prison terms for felony offenses within the meaning of section 667.5, subdivision (b). The court granted Brumfield's motion to strike the prior strike conviction.

Brumfield was sentenced to 15 years to life in count 1 (§ 187, subd. (a)), plus a five-year enhancement pursuant to section 667, subdivision (a)(1). The trial court selected count 4 as the principal determinate term and imposed a consecutive high term of four years. (Veh. Code, § 20001, subd. (b)(2).) The court

imposed a second consecutive sentence of eight months (one-third the midterm) in count 2. (*Id.*, § 10851, subd. (a).) In count 3 the court imposed the upper term of six years (§ 192, subd. (c)(1)), plus a 5-year term for the attached special allegation (Veh. Code, § 20001, subd. (c)), both of which it stayed pursuant to section 654. Finally, it imposed three one-year prior prison term enhancements under section 667.5, subdivision (b). Brumfield was sentenced to a total determinate term of 4 years 8 months and total indeterminate term of 23 years to life.

Brumfield appealed. Another panel of this court modified the judgment to strike the three one-year enhancements imposed under section 667.5, subdivision (b), and remanded the matter to the trial court to consider exercising its discretion to strike the five-year section 667, subdivision (a) enhancement under Senate Bill No.1393 (2017-2018 Reg. Sess.), which had been recently enacted. The judgment was affirmed in all other respects.

On March 11, 2019, prior to remand, Brumfield petitioned for resentencing under section 1172.6. On July 25, 2019, the trial court summarily denied the petition because the court found that Brumfield was the actual killer. Brumfield did not appeal the court's order.

On remand on August 22, 2019, the trial court exercised its discretion to strike the five-year prior serious felony conviction enhancement, noted that the appellate opinion modified the judgment to strike three one-year terms imposed under 667.5, subdivision (b), and ordered the Department of Corrections to recalculate Brumfield's custody credits.

On October 4, 2021, Brumfield filed a second section 1172.6 petition. The court appointed counsel. On December 17, 2021,

the court ruled that Brumfield was ineligible for relief under section 1172.6 because he was the actual killer.

On January 26, 2022, the trial court received Brumfield's third petition for resentencing under section 1172.6, which Brumfield prepared without the assistance of counsel. In an attached letter, Brumfield asked that new counsel be appointed. In his letter Brumfield inquired about the status of his resentencing petition and asked whether he needed to file a notice of appeal.

On March 28, 2022, the trial court denied Brumfield's request for new counsel and explained that the denial of the previous petition for resentencing did not result from counsel's errors or incompetence. The court stated that the appropriate remedy was for Brumfield to appeal the court's December 17, 2021 decision. The court made March 28, 2022, the effective date for filing a notice of appeal.

Brumfield timely appealed.

DISCUSSION

Instructional Error

Effective January 1, 2019, Senate Bill No. 1437 (2017–2018 Reg. Sess.) (Senate Bill 1437) “amended existing law on accomplice liability for murder ‘ “to ensure that murder liability is not imposed on a person who is not the actual killer” ’ (People v. Gutierrez-Salazar (2019) 38 Cal.App.5th 411, 417, quoting Stats. 2018, ch. 1015, § 1, subd. (f); see § 189, subd. (e)(1).) To accomplish this goal, Senate Bill 1437 limited accomplice liability under the felony-murder rule and eliminated

the natural and probable consequences doctrine as it relates to murder . . . (*People v. Gentile* (2020) 10 Cal.5th 830, 842–843 . . . ; *People v. Lewis* (2021) 11 Cal.5th 952, 957, 971)” (*People v. Patton* (2023) 89 Cal.App.5th 649, 655.) The bill also added former section 1170.95 (now section 1172.6),³ which provides that “[a] person convicted of felony murder or murder under the natural and probable consequences doctrine or other theory under which malice is imputed to a person based solely on that person’s participation in a crime . . . may file a petition with the court that sentenced the petitioner to have the petitioner’s murder . . . conviction vacated and to be resentenced on any remaining counts.” (*Id.*, subd. (a).) Among the requirements to be eligible for relief, the petitioner must show that he or she “could not presently be convicted of murder . . . because of changes to [s]ection 188 or 189 made effective January 1, 2019.” (*Id.*, subd. (a)(3).) Senate Bill 1437 amended section 188, subdivision (a)(3) so that “(e)xcept as stated in subdivision (e) of [s]ection 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime.” As modified, section 189, subdivision (e) provides: “A participant in the perpetration or attempted perpetration of a[n] [enumerated] felony . . . in which a death occurs is liable for murder only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The

³ Effective June 30, 2022, section 1170.95 was renumbered section 1172.6, with no changes in text (Stats. 2022, ch. 58, § 10).

person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of [s]ection 190.2.”

It is uncontested that Brumfield was not convicted of murder under a natural and probable consequences or felony murder theory of liability. Rather, Brumfield contends that due to errors in the trial court’s instructions, the jury was able to convict him of murder without making a finding that he acted with implied or express malice; specifically, he contends that the jury was instructed to convict him based on his violation of the prima facie speed law and commission of gross vehicular manslaughter. Given the nature of the alleged instructional errors, Brumfield argues that he was convicted under an “other theory under which malice is imputed to a person based solely on that person’s participation in a crime[,]” and is therefore eligible for relief under section 1172.6. We reject the contention.

Brumfield’s characterization of the prosecution’s theory of liability is inaccurate. The prosecution tried the case on the theory that Brumfield was the sole perpetrator who actually killed the victim with implied malice. No other theory of liability for murder was before the jury. The alleged instructional errors did not change the nature of the prosecution’s theory of liability. Brumfield was not tried under a theory that imputed malice to him solely on the basis of his commission of another crime.

Moreover, the instructions did not allow the jury to substitute gross vehicular manslaughter’s objective standard for implied-malice murder’s subjective standard as Brumfield argues. “The requisite culpability for the vehicular manslaughter charged here is *gross negligence* [citation], which has been defined as the exercise of so slight a degree of care as to raise a

presumption of conscious indifference to the consequences. [Citation.] On the other hand, *malice* may be implied when a person, knowing that his conduct endangers the life of another, nonetheless acts deliberately with conscious disregard for life. [Citations.] Though these definitions bear a general similarity, they are not identical. Implied malice contemplates a subjective awareness of a higher degree of risk than does gross negligence, and involves an element of wantonness which is absent in gross negligence.” (*People v. Watson* (1981) 30 Cal.3d 290, 296.) The jury was instructed under CALCRIM No. 520 that to find Brumfield guilty of murder it must find that “[a]t the time he acted, he knew his act was dangerous to human life; AND [¶] . . . [h]e deliberately acted with conscious disregard for human life.” In contrast, the jury was instructed under CALCRIM No. 592 that to find Brumfield guilty of vehicular manslaughter it must find that he acted with gross negligence, “in a reckless way that create[d] a high risk of death or great bodily injury; AND [¶] . . . [a] reasonable person would have known that acting in that way would create such a risk.” The two instructions clearly articulate the difference between the mental state for murder (subjective knowledge) and gross vehicular manslaughter (objective knowledge). The jury could not have convicted Brumfield of murder if it did not find that he acted with implied malice, including the requisite subjective mental state.

Brumfield also cannot establish that he “could not presently be convicted of murder . . . because of changes to [s]ection 188 or 189 made effective January 1, 2019.” (§ 1172.6, subd. (a)(3)). Brumfield’s arguments do not rely on the amendments Senate Bill 1437 made to sections 188 and 189, as

required by section 1172.6.⁴ “Senate Bill 1437 removed the natural and probable consequences doctrine as a basis for a murder conviction only insofar as it applied to *aider and abettor liability*. . . . [t]hat liability arose when ‘ a reasonable person in the defendant’s position would have or should have known that the charged offense was a *reasonably foreseeable* consequence of the act aided and abetted.’ [Citation.] In contrast to this vicarious liability, under which the mens rea of *an aider and abettor* towards the killing is irrelevant, the doctrine of implied malice requires that *the perpetrator* actually appreciate that death is the natural and probable consequence of his or her actions, and further requires that *the perpetrator* consciously

⁴ Relief was available for the errors Brumfield alleges prior to 2019. In 2004, in a case analogous to Brumfield’s case, a majority of the Court of Appeal, Second District, Division Seven held that it is error for a trial court to give an instruction that requires the jury to find the dangerousness-to-human-life element of implied malice based upon proof of violation of the basic speed law. (*People v. Vanegas* (2004) 115 Cal.App.4th 592, 599.)

Section 1172.6 “does not permit a petitioner to establish eligibility on the basis of alleged trial error.” (*People v. DeHuff* (2021) 63 Cal.App.5th 428, 438.) Such errors must be raised on direct appeal. In fact, Brumfield raised one of his arguments—that when read together the gross vehicular manslaughter and second degree murder the instructions removed an element of the implied malice theory of second degree murder from the jury’s consideration—on direct appeal. Another panel of this court held that the trial court erred in instructing the jury, but found the error harmless beyond a reasonable doubt due to the overwhelming evidence that Brumfield’s violation of the prima facie speed law was dangerous to human life.

disregard that danger. [Citation.] Senate Bill 1437 did nothing to remove implied malice as a basis for a second degree murder conviction.” (*People v. Roldan* (2020) 56 Cal.App.5th 997, 1004–1005, italics added.) Brumfield was the sole defendant and the actual killer, which renders him ineligible for resentencing. (*People v. Delgadillo* (2022) 14 Cal.5th 216, 233 [defendant ineligible for resentencing where “the record . . . makes clear that [the defendant] was the actual killer and the only participant in the killing”]; accord *People v. Pickett* (2023) 93 Cal.App.5th 982, 989; *People v. Garcia* (2022) 82 Cal.App.5th 956, 969–971.) Under the instructions given, the jury necessarily found that he was subjectively aware that his actions were dangerous to human life and that he deliberately acted with conscious disregard to that danger. He was not convicted of murder solely on the basis that he committed gross vehicular manslaughter. Brumfield was not convicted of murder under a natural and probable consequences, felony murder, or “other theory under which malice is imputed to a person based solely on that person’s participation in a crime.” (§ 1172.6, subd. (a).) He is prima facie ineligible for relief.

Ineffective Assistance of Counsel

Brumfield argues that appointed counsel violated his constitutional and statutory right to effective assistance of counsel by conceding that Brumfield was prima facie ineligible for relief at the section 1172.6 resentencing hearing. The People agree that Brumfield had a right to appointed counsel under section 1172.6, but assert that whether that statutory right to counsel triggers a due process right to effective assistance of

counsel is still unclear. Regardless, the People argue that Brumfield's rights could not have been violated because counsel's performance was not deficient and Brumfield cannot demonstrate prejudice; indeed, as the People correctly note, the reporter's transcript does not affirmatively show that counsel conceded Brumfield's ineligibility.

In order to establish ineffective assistance of counsel, a defendant must establish (1) that his counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that, but for counsel's error, a different result would have been reasonably probable, thus resulting in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–688, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 216–218.) “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Strickland v. Washington, supra*, at p. 694.) “If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails.” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.) Assuming (without deciding) that he is entitled to effective assistance of counsel, we conclude that Brumfield cannot demonstrate prejudice because he is ineligible for resentencing under section 1172.6.

Conduct Credits and Corrections to the Abstract of Judgment

Brumfield contends, and the People concede, that the matter must be remanded because the trial court failed to recalculate his custody credits in the mistaken belief that the

Department of Corrections would do so. We agree. “When, as here, an appellate remand results in modification of a felony sentence during the term of imprisonment, the trial court must calculate the *actual time* the defendant has already served and credit that time against the ‘subsequent sentence.’” (*People v. Buckhalter* (2001) 26 Cal.4th 20, 23, citing § 2900.1.) “A sentence that fails to award legally mandated custody credit is unauthorized” (*People v. Taylor* (2004) 119 Cal.App.4th 628, 647; see also *People v. Gisbert* (2012) 205 Cal.App.4th 277, 282.) An unauthorized sentence may be corrected at any time. (*People v. Turrin* (2009) 176 Cal.App.4th 1200, 1205; *People v. Taylor, supra*, 119 Cal.App.4th at p. 647.) We remand the matter for the trial court to recalculate Brumfield’s custody credits.

Finally, we agree with the parties that the abstract of judgment fails to reflect that the trial court did not impose the three one-year prior prison enhancements under section 667.5, subdivision (b) at Brumfield’s resentencing hearing. We order that the abstract of judgment be corrected to properly reflect the trial court’s pronouncement of sentence. Brumfield’s total sentence is a term of 15 years to life, plus a determinate, consecutive term of four years four months.

DISPOSITION

We affirm the trial court's order denying Brumfield's petition for resentencing under Penal Code section 1172.6. The three one-year prior felony conviction enhancements imposed under section 667.5, subdivision (b) that are reflected in the abstract of judgment are stricken. The matter is remanded for the court to recalculate Brumfield's custody credits. The clerk of the superior court is directed to prepare an amended abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

MOOR, J.

We concur:

RUBIN, P. J.

KIM, J.